IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-180

WILLIAM D. LEEKE, COMMISSIONER OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AND J. R. MARTIN, WARDEN OF THE CENTRAL CORRECTIONAL INSTITUTION,

Petitioners,

v.

WALTER GORDON,

Respondent.

GEORGE H. COLLINS, WARDEN OF THE MARYLAND PENITENTIARY,

Petitioner,

v.

WAYNE STEPHEN YOUNG,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, William D. Leeke, Commissioner of the South Carolina Department of Corrections, J. R. Martin, Warden of the Central Correction Institution, and George H. Collins, Warden of the Maryland Penitentiary, pursuant to Rule 23.5 of this Court, pray that writs of certiorari issue to review the judgments entered in these cases by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unreported order filed by the United States District Court for the District of South Carolina on December 2, 1976, dismissing respondent Gordon's complaint appears in the appendix to this petition (A. 23a), as does the unreported memorandum and order of November 16, 1976, of the United States District Court for the District of Maryland dismissing respondent Young's complaint (A. 19a). The memorandum and order of the United States District Court for the District of Maryland denying respondent Young's timely motion to vacate judgment was filed on December 10, 1976 (A. 21a).

The majority and dissenting opinions of the United States Court of Appeals for the Fourth Circuit in these consolidated cases were filed on March 6, 1978, and reported as *Gordon v. Leeke,* 574 F.2d 1147 (4th Cir. 1978) (A. 1a). The final order of the court of appeals in response to a timely petition for rehearing and suggestion for rehearing en banc, failing to grant rehearing en banc by an equally divided court, was filed on May 2, 1978, and is unreported (A. 18a).

JURISDICTION

The original judgment of the court of appeals was entered on March 6, 1978. A timely petition for rehearing and suggestion for rehearing en banc was originally denied on April 21, 1978; however, that order was vacated by the court of appeals sua sponte on May 2, 1978, on which date a new order denying rehearing en banc by an equally divided court was entered.

Thus, in accordance with 28 U.S.C. § 2101(c) and Rule 22.3 of this Court, the petition is due to be and is being filed on or before July 31, 1978.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Do district courts commit reversible error if they fail to give active assistance to *pro se* prisoner plaintiffs in the prosecution of their civil rights cases, to advocate legal positions not articulated or pressed by the plaintiffs, or, at their own instance, to remedy legal defects in the plaintiffs' cases?

II. Does the imposition of these duties on district courts by the court of appeals violate the principle of judicial neutrality, violate the due process rights of named or potential defendants who will face personal liability for any judgment, or otherwise so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers?

III. If these duties are properly imposed, was it reversible error under the circumstances of the present cases for the district courts to dismiss the prisoners' complaints?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code (1970 ed.; vol. 7, p. 7495), Title 28, Section 453:

> Each justice or judge of the United States shall take the following oath or affirmation before

performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

STATEMENT OF THE CASES

The South Carolina Case

In April 1976 respondent Walter Gordon, a prisoner at Central Correctional Institution in Columbia, South Carolina, brought suit in forma pauperis in the United States District Court for the District of South Carolina against William D. Leeke, Commissioner of the Department of Corrections, and J. R. Martin, Warden of the institution where Gordon was confined. Claiming federal jurisdiction under 42 U.S.C. § 1983, Gordon alleged that he had been sexually assaulted, robbed, and beaten by other inmates in the presence of two correctional officers not named as defendants in his suit. Gordon sought an order that the administration at the institution be improved, that these petitioners be fined, and that he be awarded money damages. Commissioner Leeke and Warden Martin filed an answer asserting among other things that they had no knowledge of the assault-robbery and that the doctrine of respondeat superior would not make them liable under section 1983 for the alleged actions of unnamed correctional officers.

In June 1976 Gordon filed a supplemental pleading seeking to respond to the legal objections raised by these petitioners; he made no attempt at that time or later, however, to initiate discovery to determine the names of the correctional officers who purportedly

witnessed his assault. Subsequently, on July 9, 1976, District Court Judge Robert W. Hemphill issued an order which stated in part:

> It is impossible for the Court to determine on the basis of the existing pleadings whether plaintiff Gordon has stated a colorable claim against the two defendants named. The complaint is not dismissible under Rule 12, or subject to summary judgment under Rule 56, based solely on the pleadings and the affidavit of defendant Martin. However, the Court is unwilling to set a case such as this for hearing or trial without exhausting a reasonable effort to overcome deficiencies in the pleadings which tend to obscure the question of whether plaintiff has stated a claim of constitutional import. For this reason, defendants will be required to supplement the answer filed in this cause.

On August 6 Commissioner Leeke and Warden Martin filed a supplemental answer along with documentary evidence showing that they "ha[d] never had any knowledge of the alleged incident and ha[d] in no way acquiesced in those incidents." Later, Gordon filed another pleading along with an affidavit attesting only to the occurrence of the assault in the presence of the unnamed officers but not to any involvement on the part of the defendants he had named. Two and one-half weeks later, on August 24, Judge Hemphill, "out of an abundance of precaution," ordered the filing of additional affidavits by both sides, although he lamented the absence of any demonstrable evidence of Gordon's claim. Subsequently, Gordon filed an affidavit of another inmate identifying a correctional officer named Riley as one of the persons who allegedly observed the assault, and Commissioner Leeke and Warden Martin filed an affidavit of Correctional Officer Riley and other records which established that he was off duty on the date of the incident.

Following the filing of these affidavits and additional pleadings, Judge Hemphill, on December 2, 1976, dismissed Gordon's complaint in a four-page opinion which stated in part:

> As stated in a previous Order, this case, at best, is nebulous. However, dismissal is necessary for another reason that is more compelling. The plaintiff seeks damages in this suit from two officials of the Department of Corrections who are not subject to liability for damages here under the doctrine of *respondeat superior*. The personal involvement of defendants Leeke and Martin is not shown in any of the pleadings, and they cannot be held vicariously liable for the alleged acts of their subordinates.

A. 25a-26a. On December 10 Gordon noted an appeal to the United States Court of Appeals for the Fourth Circuit.

The Maryland Case

In October 1976 respondent Wayne Steven Young, presumably pursuant to 42 U.S.C. § 1983, filed a *pro se* "Complaint for Criminal Negligence and Grand Larceny" in the United States District Court for Maryland seeking relief against "George H. Collins, et al., Warden, Maryland Penitentiary."[1] Proceeding in forma pauperis, Young claimed that Warden Collins was liable in damages for the loss of Young's watch, allegedly taken during a shakedown search of his cell. The correctional official alleged to have taken the watch was not named as a defendant, and he is not identified in the record or known to petitioners. Young sought both injunctive relief and damages. Shortly thereafter, the warden moved to dismiss, among other

[1] The complaint was served only on Warden Collins and did not name those (or indicate that there were persons whose names were unknown) intended to be included in "et al."

reasons because Young had failed "to include the proper and necessary defendants to this suit."

Young filed no response to the motion and neither amended his complaint nor made an attempt to initiate discovery to determine the individual responsible for the alleged theft. On November 16, 1976, District Court Judge Herbert F. Murray filed a memorandum and order dismissing respondent's action, stating that "Nowhere in plaintiff's complaint does he allege that George Collins even knew that the shakedown was taking place, let alone that he was involved in the theft of the watch" (A. 19a-20a). Subsequently, persisting in his notion that the warden could somehow be held responsible for the alleged grievance, Young moved to vacate the order of November 16 and for time to amend his complaint so that he could "elaborate on the culpability of the Defendant." He did not proffer what if any involvement he could possibly show on the part of Warden Collins. On December 10, 1976, Judge Murray denied the motion stating:

> Nowhere in the entire complaint does plaintiff allege one fact with reference to Mr. Collins. Further, plaintiff does not allege, in his motion to vacate, any facts to show that Mr. Collins was personally involved in the incident, nor any new facts of which he was not aware at the time he filed his original complaint.

A. 21a-22a. On December 28, 1976, Young noted an appeal to the Fourth Circuit.

In neither the South Carolina nor the Maryland case were the prisoners precluded from proceeding against the correctional officers purportedly responsible for their grievances and to this day neither is barred from bringing such an action; and, despite obvious notice of the defects in their original action, neither respondent has chosen the course of filing suit against these subordinates.

Opinion of the Court of Appeals

Consolidating the *Gordon* and *Young* cases, the court of appeals stated in its opinion that both appeals involved "the duty of a district court to assist a *pro se* prisoner-litigant in presenting a claim under 42 U.S.C. § 1983" (A. 2a). Relying upon *Haines v. Kerner,* 404 U.S. 519 (1972), and a host of decisions of the Fourth Circuit, the two-judge majority held that although dismissals in both the Maryland and South Carolina cases were warranted under applicable law, the lower courts had committed reversible error. Specifically, the majority opinion authored by Judge Winter concluded that:

1. Judge Hemphill should have advised Gordon that he could have joined Officer Riley as a defendant and sua sponte given him leave to amend; and

2. Judge Murray sua sponte should have given Young the opportunity to discover from the warden the identity of his searchers and then joined them as defendants.

In explaining its conclusion, the majority stated:

> A district court is not required to act as an advocate for a *pro se* litigant; but when such a litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court.

A. 10a. Nowhere in its opinion did the majority cite to any provision of the Constitution or laws of the United States as authority for reversing the district courts (and petitioners believe there is no such authority).

In a vigorous dissent Judge Hall argued that the majority's "duty to assist" was in reality judicial

assumption of the role of an advocate. Further, he contended that the majority's action found no support in *Haines v. Kerner,* 404 U.S. 517 (1972), or *Bounds v. Smith,* 430 U.S. 817 (1977), or in any other decision. After proffering a number of administrative and practical alternatives to judicial intrusion into the adversary process, Judge Hall observed that "once [a judge] assumes the role of an 'advocate' for a *pro se* litigant, he or she will lose the respect of either the *pro se* prisoner litigant, or the defendants whom he has sued or both" (A. 17a).

A timely petition for rehearing and suggestion for rehearing en banc was finally denied by the court of appeals on May 2, 1978. Three of the six judges in regular active service on the court dissented from the denial of rehearing en banc.[2]

REASONS FOR GRANTING THE WRIT

I.

DISTRICT COURT JUDGES HAVE NO OBLIGATION TO GIVE ACTIVE ASSISTANCE TO A *PRO SE* PLAINTIFF IN A PRISONER CIVIL RIGHTS CASE, TO ACT AS HIS ADVOCATE, OR TO SUA SPONTE ORDER THE REMEDY OF LEGAL DEFECTS IN THE PRISONER'S COMPLAINT.

The court of appeals decision of which review is sought forces a district court judge to serve two masters: justice and the litigative underdog. Petitioners submit that whether this unique obligation is termed a duty to assist or a duty to advocate, it finds no support in the decisions of this Court.

In *Haines v. Kerner,* 404 U.S. 519 (1972), this Court held that the allegations of a prisoner's *pro se* complaint in an action under 42 U.S.C. § 1983 should be held to "less stringent standards" than formal pleadings drafted by a lawyer, 404 U.S. at 654, and that the

[2] The seventh regular seat on the court of appeals has been vacant since the unfortunate death of the Honorable J. Braxton Craven, Jr., on May 3, 1977.

plaintiff should be given the opportunity to offer proof of possibly meritorious though inartfully pleaded allegations. *Id.* Although *Haines* counseled judicial sensitivity to the situation of the *pro se* prisoner civil rights litigant, it did not impose on district court judges a duty to assist such parties. And, contrary to the Fourth Circuit, the Ninth Circuit has so held (*United States v. Trapnell,* 512 F.2d 10, 12 (9th Cir. 1975)), as noted by the dissent of Judge Hall to the lower court opinion (A. 14a n.2). Moreover, although *Haines* urged trial judges to pay attention to the facts of prisoner civil rights cases, it did not authorize them to ignore the law.

In *Bounds v. Smith,* 430 U.S. 817 (1977), this Court held that the Constitution required *prison authorities* to assist inmates in the preparation and filing of meaningful legal papers by providing them with adequate law libraries or assistance from persons trained in the law. In so concluding, this Court observed that these reforms were necessary to enable a prisoner to research such issues as "proper parties plaintiff and defendant." 430 U.S. at 825. Although cataloging a long list of devices to ensure meaningful access to the courts by prisoners, 430 U.S. at 821-25, this Court at no point indicated that the duty to assist and advocate fell upon anyone other than prison authorities and their charges. In fact, this Court said that:

> If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner. Indeed, despite the "less stringent standards" by which a pro se pleading is judged, *Haines v. Kerner,* 404 U.S. 519, 520, (1972), it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous.

430 U.S. at 825-26.

Bounds v. Smith wisely refrained from placing on courts the duty of assistance to *pro se* prisoner litigants. This decision implicitly recognized that just as a trial judge cannot serve the dual function of criminal prosecutor and judge (*see In re Murchison,* 349 U.S. 133 (1955)), he cannot both prosecute and judge a prisoner's civil rights case.

More than just case law, however, counsels this Court to end the Fourth Circuit's dangerous experiment. First, as the Fourth Circuit decisions which have lead to the present cases demonstrate, there are no limits to this so-called judicial "duty to assist" the underdog. And that court has applied variations of the rule in cases where the plaintiff is represented by counsel (*Burris v. State Dept. of Public Welfare,* 419 F.2d 762 (4th Cir. 1974)), where no prisoner is involved (same), and in matters of procedure (*Roseboro v. Garrison,* 528 F.2d 309 (4th Cir. 1975)), as well as jurisdiction (*Burris*).[3]

Second, the doctrine may impose serious hardships on defendants in such actions. Here, the Fourth Circuit conceded that petitioners had a legal right to be released from respondents' suits. Nevertheless, unless this Court acts, they will be kept in the cases through protracted discovery proceedings to reach real or imagined malefactors, and the result will perhaps further clutter the already heavy federal court dockets.

Finally, respondents and other plaintiffs derive little meaningful benefit from such a rule. As Judge Hall noted in dissent:

> [N]either dismissal creates *res judicata* or collateral estoppel effects which would preclude either Gordon

[3] As the evenly divided decision on rehearing en banc indicates, there is a deep split in the circuit on the proper role of a district court judge in a *pro se* civil rights case. *See* Owens v. Oakes, 568 F.2d 355 (4th Cir. 1978), where a different panel of judges upheld the dismissal of a prisoner's civil rights complaint on precisely the same kind of facts as were alleged in the present cases.

> or Young, or both of them from reinstituting a different suit against the culpable parties whether known or unknown, yet identifiable in some manner by reasonable due diligence assuming their respective suits are not otherwise time-barred by the appropriate statute of limitations.

A. 11a.

II.

THE LOWER COURT DECISION SO INVITES VIOLATION OF JUDICIAL IMPARTIALITY AND SO VIOLATES THE DUE PROCESS RIGHTS OF NAMED OR POTENTIAL DEFENDANTS AS TO WARRANT EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

In *Calversi v. United States*, 348 U.S. 961 (1955), out of concern for the appearance of judicial impartiality, this Court exercised its supervisory power to reverse and remand a criminal case for retrial before a different judge. What was simply an isolated aberration corrected in *Calversi* is now virtually a rule of law in the Fourth Circuit. District court judges must keep dead cases alive: retain defendants as parties who legally should be dismissed from the case. They must order discovery about unnamed persons, who are potential defendants who will face personal liability for money judgments, even when no one asks for it. They must compel joinder of parties whom plaintiffs have no interest in joining. They must grant leave to amend sua sponte. Such conduct is the antithesis of judicial neutrality and raises serious due process questions relating to the rights of named and potential defendants.

Impartiality is the epitome of the judicial function. From Socrates's definition of the proper qualities of every judge,[4] to the Code of Judicial Conduct,[5] to a

[4] To hear courteously; to answer wisely; to consider soberly; and to decide impartially. *See* Pfizer, Inc. v. Lord, 456 F.2d 532, 533 (8th Cir. 1972).

[5] "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2A of the Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association on August 16, 1972.

federal judge's oath of office,[6] this rule has remained inviolate. And countless are the tangible expressions of its dictates:

> The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J.).

* * *

> It is well-established that the conduct of a trial judge must be measured by a standard of fairness and impartiality. He is not a mere moderator, however; and his duty is to conduct an orderly trial and to make certain, as far as possible, that there is no misunderstanding of the testimony. As this Court has noted, the trial judge "cannot be forced to occupy a passive position as moderator between the disputants." In participating in the trial, the trial judge, however, may not give the jury his views upon ultimate issues of fact, nor take over the argument of one of the parties. . . .

Nordmann v. National Hotel Co., 425 F.2d 1103, 1109 (5th Cir. 1970) (citations omitted).

* * *

> A Judge should no more reach out for a case than a lawyer should be allowed to shop for a forum.

Lawton v. Tarr, 327 F. Supp. 670, 674 (E.D.N.C. 1971) (Craven, J.).

* * *

[6] This oath is contained in 28 U.S.C. § 453:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially

> It is not the duty or the responsibility of the trial judge to give legal advice to an accused or to any party in any federal proceeding.

Flores v. United States, 337 F. Supp. 45, 48 (D.P.R. 1971).

* * *

> The function of a judge [in a prisoner's civil rights case] is to determine controversies between litigants, and he is not an adjunct or adviser, or an investigating instrumentality, of other agencies of government.

Wiggins v. Anderson, 386 F. Supp. 369, 371 (E.D. Okla. 1974).

These same concerns are forcefully reflected in Judge Hall's dissent:

> My concern lies . . . with the delicate procedural balance to be struck between the settled right of an indigent to proceed *pro se* in the courts, the duty of such a litigant to proceed by complying with certain of the basic rules of legal procedure and substantive law, and the role the court is to impartially play in monitoring such litigation throughout. In striking that balance, no matter how well-intentioned a judge may be, once he assumes the role of an "advocate" for a *pro se* litigant, he or she will lose the respect of either the *pro se* prisoner litigant, or the defendants whom he has sued or both.
>
> To the extent that a duty to "assist" can be read into the penumbra of the majority decision, I vigorously, and most respectfully dissent.

A. 16a-17a. In summary, the novel judicial duty created by the Fourth Circuit to assist plaintiffs and advocate their cause, if allowed to stand, will abrogate the long-standing duty of judicial impartiality and profoundly affect the due process rights of named and potential defendants, all of whom face possible personal liability for money judgments.

---

discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

III.

UNDER THE CIRCUMSTANCES OF THESE CASES, THE LOWER COURTS VIOLATED NO DUTY TO ASSIST *PRO SE* CIVIL RIGHTS LITIGANTS.

The court of appeals did not hold that any rights of respondents had been violated by the decisions of the district courts. In fact, the appellate court upheld the legal correctness of the trial judges' determinations that petitioners were not liable. Nevertheless, the Fourth Circuit held that the district court judges first should have advised respondents of their right to join certain persons in the action and that the judges should have facilitated that joinder actively.

The records in both the South Carolina and Maryland cases demonstrate that such notice had been effectively given, however, and disregarded by respondents. The pleadings of Gordon and Young obviously indicated their familiarity with legal procedure. Early in the proceedings, petitioners' pleadings highlighted the non-involvement of named parties. In the Maryland case non-joinder of necessary parties was specifically asserted. In the South Carolina case Judge Hemphill in his first two opinions deliberately and repeatedly focused on the problem. Respondents either had knowledge of their names or were not without facilities of their own to discover those who purportedly caused their grievances. Discovery in accordance with the Federal Rules of Civil Procedure, and by other mechanisms such as state public information laws, was available to them but not employed. Nevertheless, they made no attempt to sue the proper parties out of an erroneous fixation that their wardens must be held responsible and made to pay.

Finally, respondents have suffered no injury from the concededly correct dismissal of their actions. As noted earlier, they still may be able to sue the proper defendants. In short, there was no violation of the

Fourth Circuit's novel duty to assist *pro se* litigants and any violation, if it occurred, amounted to no more than *damnum absque injuria.*

CONCLUSION

In summary, petitioners urge review of the court of appeals judgments in order to rectify the balance they now tip in favor of judicial partiality and inefficiency. Prisoner civil rights cases that should be concluded must be concluded.

Petitioners respectfully urge this Court to grant writs of certiorari to the United States Court of Appeals for the Fourth Circuit to review and ultimately reverse judgments which, if allowed to stand, can only have a deleterious effect on the administration of justice.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For The Fourth Circuit

No. 77-1137

Walter Gordon,
Appellant,
v.
William D. Leeke, Commissioner;
Joe Martin, Warden,
Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert W. Hemphill, District Judge.

No. 77-1194

Wayne Stephen Young,
Appellant,
v.
George H. Collins, Warden, et al.,
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge.

Argued November 10, 1977 *Decided March 6, 1978*

Before Winter, Butzner and Hall, Circuit Judges.

George Wm. Warren, IV, for Appellants in 77-1137 and 77-1194; Emmet H. Clair, Senior Assistant Attorney General (Daniel R. McLeod, Attorney General of South Carolina, Katherine W. Hill, Assistant Attorney General; Francis B. Burch, Attorney General of Maryland, and Kathleen M. Sweeney, Assistant Attorney General, on brief) for Appellees in 77-1137 and 77-1194.

WINTER, Circuit Judge:

Because these appeals both concern the duty of a district court to assist a *pro se* prisoner-litigant in presenting a claim under 42 U.S.C. § 1983, we consolidated them for briefing and argument, and we decide them together. In No. 77-1137 (the South Carolina case), the plaintiff sought injunctive relief and money damages for alleged mistreatment by fellow inmates, acquiesced in by prison guards. He sued the warden and a commissioner of the Department of Correction. The district court required the defendants to supplement their pleadings and permitted plaintiff to supplement his, in an effort to determine if plaintiff had a meritorious cause of action. On the expanded pleadings and affidavits, the district court granted summary judgment for the defendants. In No. 77-1194 (the Maryland case), plaintiff sued the warden for damages for the loss of a watch allegedly stolen during a shakedown search. The district court permitted the filing of plaintiff's *pro se* complaint, but granted the defendants' motion to dismiss under Rule 12(b)(6), F. R. Civ. P. It denied a subsequent motion for leave to amend.

We reverse in both cases.

I.

The South Carolina Case

Walter Gordon, convicted of a felony by a South Carolina state court, was placed under psychiatric observation in Cell Block Two at the Central Correctional Institution at Columbia, South Carolina, shortly after he began service of his sentence. On January 29, 1976, he was removed to Cell Block One, where he became part of the general population of the prison. On February 3, 1976, he was transferred to Kirkland Correctional Institution.

According to Gordon, he was subjected to a brutal beating, robbery and homosexual rape by four fellow inmates sometime between January 29 and February 3. He claims that the several attacks were witnessed by two correctional officers who did nothing to prevent or halt them. He further alleges that on February 1, 1976, he requested the Deputy Warden to provide him protection but that the Deputy Warden failed to act upon his request except to return him to the psychiatric cell block.

In addition, Gordon alleged that he was thereafter duped by another inmate, a certain Thomas Massey, into causing his family to send $50.00 to Massey who would prepare a writ that would "guarantee" Gordon's release.

Gordon's *pro se* complaint was filed against William D. Leeke, a commissioner of the South Carolina Department of Correction, and J. R. Martin, Warden of the Central Correctional Institution. As relief, Gordon sought an order that the administration at Central Correctional Institution be corrected, that defendants be fined, and that he be awarded money damages.

The complaint was hopelessly inadequate to allege a cause of action on which relief could be granted. Among other things, it failed to state either the date of the alleged attack, whether it occurred in Cell Block One or Two, and the identity of either the attacking inmates or the acquiescent guards. The defendants answered, denying knowledge of any alleged abuse of Gordon, but conceding that the records disclosed that Massey received $50.00 from "J. H. Gordon." They raised certain legal defenses, pleaded a lack of knowledge of many of the essential facts, and moved to dismiss the

complaint under Rule 12(b)(6). In a reply to this answer, Gordon conceded that Massey had refunded the $50.00 and this phase of Gordon's claims was effectively eliminated from the case.

The district court ruled that, with respect to the alleged assault, it could not dismiss the complaint under Rule 12(b)(6), nor could it grant summary judgment for defendants. At the same time, it ruled that it would not set the case for trial until the pleadings had been amplified so that it could determine if Gordon had alleged at least a colorable claim. Accordingly, the district court required defendants to supply additional information and it afforded Gordon the opportunity to respond thereto.

As a result of defendant's supplemental answer, with affidavits and exhibits thereto, and Gordon's verified responses, including an affidavit from another inmate, some of the details of Gordon's alleged cause of action emerged. In another interim ruling, the district court recited (1) that Gordon's statements fixed the date on which the assault on him had occurred as January 29, 1976; (2) that the affidavit of another inmate, Joe Harris, stated that he saw ("[i]n January, 1976, I don't remember the exact date,") four black inmates pull Gordon into a cell and beat him while two black officers stood by and watched without intervening; and (3) that Gordon, whose face was badly beaten, said about an hour later that he had been raped and robbed but made no claim to the prison authorities that he had been assaulted until April 7, 1976, although he had conversed with at least one official after the alleged incident. The district court stated its belief that Gordon's case was "nebulous, at best," and that his claim of rape was highly suspect because he did not inform the prison authorities of it until April 7, 1976. Nonetheless, the district court directed Gordon to submit an affidavit identifying any persons whom he claimed raped him and directed defendants to submit an affidavit from the officer in charge of the cell block

in which Gordon was incarcerated on January 29, 1976 as to any incident of the type which Gordon alleged.

In response, Gordon filed three affidavits. In the first, which was made by him, he noted that he had previously declined to name his attackers because of fears for his life; he then stated that, while he did not know the names of three of them, the name of the fourth was Bernard Brown. The second affidavit was that of Joe Harris who said that one of the guards who had witnessed the attack was Officer Reilly [sic] and that Harris could identify him by reason of previous contacts between the two of them. The third affidavit was that of David Johnson, another inmate, who said that Gordon had told him on the day of the incident that Gordon refused medical treatment for his face because he feared that disclosure of the incident might endanger his life.

In response, defendants filed a second and third supplemental answer supported by affidavits and prison records. Succinctly stated, these pleadings asserted that Assistant Correctional Supervisor M. Woodward, Jr., was in charge of the cell block in which Gordon was confined on the date of the alleged incident, but that Woodward had no knowledge, nor did he receive any report, of any attack on Gordon. Neville Riley, the correctional officer named by Harris, made an affidavit that he was the only person of that name employed as a correctional officer at the Central Correctional Institution but that he was not on duty on January 29, 1976 and was never aware that Gordon had been assaulted or in any way physically abused. The attendance records of the institution showing that Riley did not work on January 29 were attached.

On the pleadings, expanded as recited above, the district court made a final ruling. On its analysis of the facts, it candidly disclosed that "the Court is not fully persuaded that some type of assault did not occur." Notwithstanding, the court dismissed the complaint on the grounds that, factually, Gordon had alleged no

cause of action against Leeke and Martin and, legally, they could not be held liable in an action under § 1983 for the misconduct of their subordinates under the doctrine of *respondant superior.*

The Maryland Case

Wayne Stephen Young sued George H. Collins, Warden of the Maryland Penitentiary, under § 1983 for money damages and injunctive relief. Young alleged that he was removed from his cell in the West Wing of the Penitentiary, as were all other prisoners in the West Wing, for a shakedown search conducted on September 10, 1976, and that during the search only corrective officers were present in the cell. When he was returned to his cell, he discovered that his watch and metal watchband had been stolen.

The defendant moved under Rule 12(b)(6) to dismiss the complaint, and the district court granted the motion. It noted that Young had alleged that "only corrections officers were in the wing at the time;" but it concluded that since Young failed to allege that the warden even knew that the search was taking place, let alone that he was involved in the theft, a claim for relief was not stated since the doctrine of *respondeat superior* was inapplicable. When Young thereafter moved to strike the order of dismissal to permit him "to prepare and submit an amended complaint establishing proper grounds for proceeding in the prosecution of this case," the district court denied the motion. It filed another memorandum justifying its denial on the ground that Young had not alleged, either in his original complaint or in his motion, any facts to show that the warden was personally involved, nor did Young allege any facts not set forth in the original complaint.

II.

It is now established doctrine that pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated, and even if the

claim is insufficient in substance, it may be amended to achieve justice. Rice v. Olson, 324 U.S. 786, 791-92 (1945); Holliday v. Johnston, 313 U.S. 342, 350 (1941). In one of the latest expressions on the subject, Haines v. Kerner, 404 U.S. 519, 521 (1972), it was said that a complaint, *especially* a *pro se* complaint, should not be dismissed summarily unless "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" quoting from Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Our own decisions reflect these views. In Burris v. State Department of Public Welfare of S.C., 491 F.2d 762 (4 Cir. 1974), we held that when plaintiff sued the South Carolina Department of Public Welfare alleging that his application for welfare was denied without a hearing but failing to allege a jurisdictional amount or other basis for federal jurisdiction, the district court should have apprised his *counsel* of the availability of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). We also recognized that the named defendant was probably not a "person" within the meaning of § 1983, but we directed the district court to consider the case on its merits "assuming that the complaint is amended to come within these statutes." 491 F.2d at 763. To like effect is Johnson v. Mueller, 415 F.2d 354 (4 Cir. 1969). In Roseboro v. Garrison, 528 F.2d 309 (4 Cir. 1975), we held that a district court must advise a *pro se* litigant of his right under the summary judgment rule to file opposing affidavits to defeat a defendant's motion for summary judgment.

The conclusions to be drawn from these decision of the Supreme Court and our own, especially *Burris,* were well stated by the district court in Canty v. City of Richmond, Va., Police Dept., 383 F.S. 1396 (E.D. Va. 1974), *affirmed,* 526 F.2d 587 (4 Cir. 1975), *cert. denied,* 423 U.S. 1062 (1976):

> [T]he Fourth Circuit takes the position that its district courts must be especially solicitous of civil rights plaintiffs.
>
> * * * * * *

This solicitude for a civil rights plaintiff with counsel must be heightened when a civil rights plaintiff appears *pro se*. In the great run of *pro se* cases, the issues are faintly articulated and often only dimly perceived. There is, therefore, a greater burden and a correlative greater responsibility upon the district court to insure that constitutional deprivations are redressed and that justice is done. So, although the Court of Appeals cannot mean that it expects the district courts to assume the role of advocate for the *pro se* plaintiff, radiations from Burris strongly suggest that the district court must examine the *pro se* complaint to see whether the facts alleged, or the set of facts which the plaintiff might be able to prove, could very well provide a basis for recovery under any of the civil rights acts or heads of jurisdiction in the federal arsenal for redress of constitutional deprivations. Accordingly, the Court in considering the defendants' motion to dismiss will not permit technical pleading requirements to defeat the vindication of any constitutional rights which the plaintiff alleges, however inartfully, to have been infringed. 383 F.S. at 1399-1400.

III.

The South Carolina Case

In the South Carolina case, in accordance with the principles discussed, the district court was altogether correct in declining to dismiss Gordon's complaint as originally drafted. It was theoretically possible that Gordon could prove thereunder a state of facts which would entitle him to recover, although it was certain that the precise basis for recovery was not alleged. By the same token, the district court was correct in its initial determination not to grant summary judgment. What might be a meritorious claim on the part of a *pro se* litigant unversed in the law should not be defeated without affording the pleader a reasonable opportunity to articulate his cause of action. We approve of the district court's efforts to obtain from Gordon and defendants a full disclosure of the facts of the case so

that the district court could make an informed judgment on its merits.

Nevertheless, we reverse because we think the district court did not fully appreciate the additional facts that it obtained or recognize that these facts were disputed and could not be resolved on motion for summary judgment. From the additional pleadings, affidavits and exhibits, it appears that Gordon is asserting that he was brutalized on January 29, 1976 by fellow inmates, that the correctional officers, Neville Riley and another, were present and saw what was transpiring, but, nevertheless, that Riley and the other unknown guard declined to intervene and permitted the assault to continue. In our view, Gordon has thus alleged a cause of action under § 1983.

Of course, Gordon's claim for damages is against Riley and not the defendants he sued. Bursey v. Weatherford, 528 F.2d 483, 488 n.7 (4 Cir. 1975). Dismissal or summary judgment as to the warden and the commissioner was proper.[1] But since the identity of Riley, one of the correctional officers allegedly involved, was finally established, the district court should have advised Gordon that, pursuant to Rule 19(a), F. R. Civ. P., Riley could have been made a defendant and given Gordon leave to join him.

Summary judgment as to Riley would be inappropriate on the present record. Gordon now claims that Riley was one of the correctional officers present at the January 29, 1976 attack and the allegation is supported by the affidavit of Gordon's fellow inmate, Joe Harris. Of course, Riley has stated by affidavit that he was not present and he has offered the institution's attendance logs to corroborate him. It may well be that Gordon has a weak case and little chance of recovery from Riley,

[1] Since Gordon's various pleadings do not suggest that the incident of which he complains was anything other than an isolated one or that it resulted from any administrative policy established or maintained by the warden or the commissioner, we see no ground for injunctive relief against either.

but the material fact of Riley's presence or absence is disputed and summary judgment is inappropriate. Rule 56(c), F. R. Civ. P.

The Maryland Case

Of course, Young did not allege a claim for damages upon which relief could be granted against the warden of the Maryland Penitentiary. Bursey v. Weatherford, *supra*.[2] But we think that it was error to deny a *pro se* civil rights litigant leave to amend his complaint even though he did not state in his motion for leave how he would cure the deficiencies in his pleading.

It would seem to us that, on the basis of his allegations, Young may have a claim for damages against the guard or guards who searched his cell under § 1983. Since Young thus alleged facts under which a meritorious claim might be proved, his complaint should not have been dismissed; Young should have been granted the opportunity to disclose the identity of the searchers, if known to him, and to have joined them as defendants in substitution for the warden; or, if Young did not know their identity, the court should have afforded him the opportunity to discover them from the warden, either from his personal knowledge, the personal knowledge of his subordinates or the records of the institution, and advised Young how to proceed. A district court is not required to act as an advocate for a *pro se* litigant; but when such a litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court. If it is apparent to the district court that a *pro se* litigant has a colorable

[2] In our view, Young's allegations were insufficient to state a claim for injunctive relief against the warden. See n.1, *supra*.

claim but lacks the capacity to present it, the district court should appoint counsel to assist him.[3]

In accordance with the foregoing, we reverse the judgments in both cases and remand them for further proceedings in accordance with the views we have expressed.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

I.

THE DISMISSALS

In the South Carolina case, while I believe that the district judge might better have advised Gordon to join Riley as a defendant and have given him leave to do so, I would nevertheless affirm the dismissals in each case because I believe on the record presented to it each district court properly held that the respective plaintiffs had failed to properly state any cause of action under *respondeat superior* against the named parties defendant. To me, *Owens v. Oakes*, ___ F.2d ___ (No. 76-1646 January 10, 1978) is controlling in both cases and should be followed. The suit against Superintendent Oakes was not different from the suits filed by Gordon and Young here.

However, to me, neither dismissal creates *res judicata* or collateral estoppel effects which would preclude either Gordon or Young, or both of them from reinstituting a different suit against the culpable parties whether known or unknown, yet identifiable in some manner by reasonable due diligence assuming their respective suits are not otherwise time-barred by the appropriate statute of limitations.

[3] We agree with our dissenting co-panelist that, rather than to dismiss a claim having colorable merit but pleaded insufficiently, a district court should appoint counsel to assist the *pro se* litigant. The difficulty here is that neither was counsel for Young appointed, nor was Young advised of the proper procedures to develop his claim.

II.

The Duty To Assist The Litigant

At the outset of the opinion, the majority notes that these appeals present a unified question concerning ". . . the duty of a district court to *assist* a *pro se* prisoner-litigant in presenting a claim under 42 U.S.C. § 1983" [Emphasis added]. When such a "duty" is confined to the particular facts presented in these appeals, my reading of the majority opinion concerning the "duty to assist" a litigant becomes, in reality, nothing more than a pragmatic application of the rule favoring liberality in the amendments to pleadings, and especially complaints, under Federal Rule of Civil Procedure 15(a) together with the broad construction to be given to the pleadings filed by a *pro se* prisoner litigant in civil actions as required by *Haines v. Kerner*, 404 U.S. 519 (1972).

The majority properly states and carefully indicates that a district court is not required to act as an advocate for a *pro se* litigant. I wholeheartedly concur with that express limitation placed upon the majority's own holding. To me, the duty to "construe liberally" and perhaps "to advise" is the court's. The duty to "present" and to "advocate" is that of the litigant or his attorney.

Such a limitation strikes a sound balance between advocacy and judicial impartiality. Neither *Haines v. Kerner, supra,* nor our decision in *Burris v. State Department of Public Welfare of South Carolina*, 491 F.2d 762 (4th Cir. 1974), nor our unpublished *per curiam* affirmance of *Canty v. City of Richmond, Va. Police Dept.*, 383 F. Supp. 1396 (E.D. Va. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976), created any duty upon a district court to "assist" a *pro se* litigant, as opposed to merely "advising" him as the majority notes.[1] Further, the district court in *Canty*, like

[1] In part III of the majority opinion, in the section devoted to the Maryland case, the court holds in part that:

> . . . when [a *pro se*] litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how to proceed and *direct* or permit amendment of the pleadings to bring that person or persons before the court. * * *

Emphasis added.

To the extent that the majority creates a duty upon the district courts to "direct" an amendment to the pleadings, I read the majority additionally to hold that if the litigant fails to comply with the court's "directives," embodied in an appropriate order, of which the litigant has notice, that the suit may be dismissed. See Rule 41(b), Federal Rules of Civil Procedure.

Another alternative open to and currently utilized by some district courts in this Circuit is the conditional dismissal, subject to amendment of the defective pleading by the *pro se* litigant, upon pain of final dismissal for failure to cure the legal deficiency or shortcomings in his suit. I would likewise approve of this procedural vehicle for managing a *pro se* suit. *See Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts*, Federal Judicial Center, Tentative Report No. 2, May 20, 1977, at 55-8 (cited hereafter as "Tentative Report;" *Covington v. Cole*, 528 F.2d 1365, 1372-3 (5th Cir. 1976).

the majority here, expressly disavowed any requirement that ". . . the district courts [are] to assume the role of [an] advocate for the *pro se* plaintiff, . . ." *Id.*, at 383 F. Supp. 1399-1400. This logically follows when *Haines, supra,* and *Bounds v. Smith,* ____ U.S. ____, 97 S. Ct. 1491 (1977), are read together.

In *Bounds*, the Supreme Court held that an incarcerated *pro se* litigant had a fundamental constitutional right of access to the courts through the access to an adequate law library or from the adequate legal assistance of persons trained in the law. The decision both in this court and in the Supreme Court was clearly in the disjunctive. *Smith v. Bounds*, 538 F.2d 541, 544 (4th Cir. 1975); *Bounds v. Smith,* ____ U.S. ____, ____, 97 S. Ct. 1491, 1498 (1977). *Haines v. Kerner, supra,* requires no more than when an individual litigant chooses to proceed *pro se* and utilizes his resources (now including legal references) to file

pleadings, or other documents, a district court must construe them broadly. 404 U.S. 519, 520-521.[2]

III.

COUNSEL

Should a district court, at some juncture, believe that a case is "exceptional," it is clearly empowered, in its discretion, to appoint counsel to assist the litigant in pursuing his or her respective civil rights claim. 28 U.S.C. § 1915(d); *Cook v. Bounds,* 518 F.2d 779 (4th Cir. 1975).

With the entry of counsel, all aspects of the underlying cause of action could be clarified, *Loper v. Beto,* 405 U.S. 473, 476 at n.2 (1972), and the proper parties could be brought before the court, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 389 at n.2 (1971).

During the course of the litigation, should discovery become necessary, and hearings or a trial required later,[3] counsel will certainly be in a far better position to assist the litigant and the court than will the judge who chooses instead to struggle with an unlearned and sometimes barely literate prisoner.[4] Prevailing counsel

[2] Albeit in the context of *pro se* criminal representation, the Ninth Circuit has held that *Haines* was not a "[case] for all seasons" invoking a "duty to assist" an individual proceeding *pro se. See United States v. Trapnell,* 512 F.2d 10 (9th Cir. 1975).

[3] In the somewhat analogous field of federal and state habeas corpus proceedings, in which litigants frequently proceed *pro se,* counsel *may* be appointed to aid the litigant and the court in the discovery process and during evidentiary hearings which may be conducted. See Rules 6(a) and 8(c) of the *Rules Governing Section 2254 [and separately the Section] 2255 Proceedings for the United States District Courts,* 28 U.S.C.A. foll. §§ 2254, 2255 (effective Feb. 1, 1977). These rules pointedly demonstrate the sound discretion vested in the district courts to consider appointment of counsel when it will aid both the litigant and the court.

[4] Obviously, I do not urge wholesale appointment of counsel in all civil rights cases, nor do I urge relaxation of

could be awarded attorneys fees in appropriate circumstances under the Civil Rights Attorney Fee Awards Act of 1976, now codified as 42 U.S.C. § 1988.

Finally, should individual counsel be unavailable for any reason, certain states, including South Carolina, now have, or are developing programs for inmate counseling and legal representation in various areas of prison life including *pro se* civil rights suits. The Supreme Court has recognized the role counsel can play in assisting prisoners in properly pursuing their grievances, *Bounds v. Smith,* ___ U.S. ___, 97 S. Ct. 1491, 1499-1500 at n.n. 19-20, and the district courts may be able to draw from this source of attorneys when appropriate.[5]

IV.

AMENDMENTS OF PRO SE FORMS

While it will not cure the problems presented in the cases now on appeal, district courts might want to consider amendments to the standard preprinted forms utilized by prisoners in *pro se* civil rights suits. Therein, on any cover page of instructions, or on the portion of

the standards set forth in *Cook v. Bounds, supra.* What I do recognize is that many pragmatic problems beset a district judge in the administration of a *pro se* case beyond simply allowing a prisoner to file and amend his suit. For example, the security problem in prisoner cases undoubtedly presents a problem, *Cook v. Bounds, supra,* at 780 n.1, which the appointment of counsel can help alleviate, *United States v. Madden,* 352 F.2d 792, 793 at n.1 (9th Cir. 1965). *See also Ballard v. Spradley,* 557 F.2d 476 (5th Cir. 1977).

[5] In South Carolina, pursuant to LEAA funding grants, now state funded, a clinic has been established which operates under the auspices of the South Carolina Law School. Preliminary findings indicate a dramatic statistical effect in the reduction of meritless prisoner cases, both post-conviction and under § 2983, and the clinic has undertaken the prosecution of at least one significant prisoners' rights § 1983 suit. *Six Month Narrative Report, Consortium of States to Furnish Legal Counsel to Prisoners,* LEAA Grant 76-DF-99-0077, October 1, 1976 — March 31, 1977, Statistical Reports, South Carolina, p. 2.

the heading of the suit, underneath where the defendants are to be named, some language could be added in plain English such as the following:

> You must name the people as defendants whom you contend hurt you or caused you harm in some way. For example, if you are assaulted by guards, their names must be stated if you know them, or in the alternative you must make reference to them in some way. If you cannot name them, say so, and state why.
>
> In your complaint, you must state the *facts* (who, what, when, where and how) that support your contentions, not mere conclusions.
>
> If you contend that the warden, or some other supervisory official or their subordinates caused you harm, you likewise must name them if known, or you must make reference to them in some way. If you cannot name them, say so and state why. As noted, in your complaint, you also must state the *facts* (who, what, when, where and how) that support your contentions not mere conclusions.
>
> *Note:* In order for a supervisory official, or the warden to be liable for any harm you are claiming, you must allege and have some proof that that person either expressly or implicitly authorized the conduct which you contend harmed you, or have acquiesced in it in some way.[6]

V.

Conclusion

These appeals do not present the ever-present problem of the patently frivolous or repetitive prisoners' rights cases which tax an already overburdened court system.[7] My concern lies instead with the delicate

[6] *See* Tentative Report at 43-55, and recommended forms, at 83-5; *Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir. 1977).

[7] The district courts have, at their ready disposal, many procedural mechanisms to forestall the abuse of *pro se* suits. While not exhaustive, a listing of those procedural tools are set forth as follows: 28 U.S.C. § 1915(d) (dismissal where action is frivolous or malicious); 28 U.S.C. § 1915(a) and *Graham v. Riddle*, 554 F.2d 133 (4th Cir. 1977) (right to proceed *in forma pauperis* conditioned upon a showing of good cause, and upon payment of the filing fee); *Sanders v. United States*, 373 U.S. 1 (1963) (successive claims ordinarily need not be reviewed); and *Carroll v. Rankin*, 560 F.2d 1177 (4th Cir. 1977) (summary judgment).

procedural balance to be struck between the settled right of an indigent to proceed *pro se* in the courts, the duty of such a litigant to proceed by complying with certain of the basic rules of legal procedure and substantive law, and the role the court is to impartially play in monitoring such litigation throughout.[8] In striking that balance, no matter how well-intentioned a judge may be, once he assumes the role of an "advocate" for a *pro se* litigant, he or she will lose the respect of either the *pro se* prisoner litigant, or the defendants whom he has sued or both.

To the extent that a duty to "assist" can be read into the penumbra of the majority decision, I vigorously, and most respectfully dissent.

[8] *See e.g. Graham v. Riddle, supra* at 134; *Caviness v. Somers*, 235 F.2d 455, 456 (4th Cir. 1956); *Fletcher v. Young*, 222 F.2d 222, 224 (4th Cir. 1955).

United States Court Of Appeals
For The Fourth Circuit

No. 77-1137

Walter Gordon,

Appellant,

versus

William D. Leeke, Commissioner;
Joe Martin, Warden,

Appellees.

No. 77-1194

Wayne Stephen Young,

Appellant,

versus

George H. Collins, Warden, et al,

Appellees.

ORDER
(Filed May 2, 1978)

IT IS ORDERED that the order filed April 21, 1978 is vacated.

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll on the suggestion for rehearing en banc was requested and the suggestion fails for want of a majority of judges eligible to vote in the poll.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS FURTHER ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Winter. Judge Russell, Judge Widener and Judge Hall dissent from the denial of rehearing en banc.

FOR THE COURT.

/s/WILLIAM K. SLATE, II,
Clerk.

In The United States District Court
For The District Of Maryland

Civil No. HM76-1609

Wayne Stephen Young

v.

George H. Collins

MEMORANDUM AND ORDER
(Filed November 16, 1976)

The plaintiff, Wayne Stephen Young, an inmate at the Maryland Penitentiary, has filed this *pro se* complaint which the court will construe as filed under 42 U.S.C. § 1983, to attack the conditions of his custody, alleging the theft of his watch during a shakedown in the Penitentiary. Plaintiff seeks an injunction requiring that "in all shakedowns of the cells in the Maryland Penitentiary, each inmate to be present at his cell" and the monetary value of his watch and watch band.

The defendant, George H. Collins, has moved to dismiss on the ground, *inter alia,* that the complaint does not allege any personal involvement in the incident by him. A thorough reading of the complaint indicates that "only corrections officials were in the wing at the time." Nowhere in plaintiff's complaint does he allege that George Collins even knew that the

shakedown was taking place, let alone that he was involved in the theft of the watch. "As a general rule, an official will not be liable in an action brought under the Civil Rights Act, 42 U.S.C. § 1983, unless he directly and personally participates in conduct under color of state law which deprives the plaintiff of rights, privileges and immunities secured to him by the federal Constitution." *Richardson v. Snow,* 340 F. Supp. 1261 (D. Md. 1972) at 1262.

Accordingly, it is this 16th day of November, 1976, in the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant's motion to dismiss be, and the same hereby is, *Granted.*

(2) that the Clerk mail copies of this Memorandum and Order to the plaintiff and to Assistant Attorney General Kathleen M. Sweeney, Esquire.

HERBERT F. MURRAY,
United States District Judge.

In The
United States District Court
For The District Of Maryland

Civil No. HM76-1609
Wayne Stephen Young
v.
George H. Collins

MOTION AND ORDER
(Filed December 10, 1976)

In a Memorandum and Order of November 16, 1976, this court dismissed the above-captioned case. Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, the plaintiff timely filed a motion to vacate judgment. It is this motion that is now before the court.

Plaintiff, Wayne Stephen Young, an inmate at the Maryland Penitentiary, filed a *pro se* complaint with this court seeking the monetary value of his watch and watch band which he alleges were stolen by a prison guard during a shakedown of the cells. The defendant moved to dismiss the complaint. This court, after careful consideration of the plaintiff's complaint as well as the relief sought, concluded that there was no basis of liability on the part of Mr. Collins. Plaintiff now asks this court for leave to amend his complaint so that he may properly allege that Mr. Collins was involved in the theft. The defendant opposes this motion asserting that "there is no basis in fact whatsoever to find any liability on the part of Defendant Collins." This court must agree with this position. Nowhere in the entire complaint does plaintiff allege one fact with reference to Mr. Collins. Further, plaintiff does not allege, in his motion to vacate, any facts to show that Mr. Collins was personally involved in the incident, nor any new

facts of which he was not aware at the time he filed his original complaint.

Accordingly, it is this 10th day of September, 1976, in the United States District Court for the District of Maryland,

ORDERED that plaintiff's motion to vacate judgment be, and the same hereby is, *Denied.*

HERBERT F. MURRAY,
United States District Judge.

In The
District Court Of The United States
For The District Of South Carolina
Columbia Division

Civil Action No. 76-751

Walter Gordon,

Plaintiff,

v.

William D. Leeke, Commissioner,
Joe Martin, Warden,

Defendants.

ORDER

(Filed December 2, 1976)

The parties have endeavored to respond to the latest Order entered in this cause on August 24, 1976 by filing supplements to earlier pleadings and affidavits. The plaintiff has submitted three affidavits and the defendants have submitted two affidavits and an exhibit with two supplemental answers.

The plaintiff in his affidavit of August 31, 1976 identifies one of his alleged assailants as "Bernard Brown."[1] A fellow inmate, Joe Harris, also by affidavit of August 31, avers that he witnessed four black inmates force Walter Gordon into a cell "in January" while two black officers stood by and watched "but . . . did nothing to assist Gordon." Harris states that he cannot name the attackers, but that one of the officers

[1] Plaintiff avers that he has heretofore declined to identify Brown because of fear for his (plaintiff's) life; he denies that he knows the identity of either of the other three alleged malefactors who assaulted him on or about January 29, 1976. He does not name either of the two officers who allegedly neglected to intercede for him when the assault commenced within their field of view of Cell Block One.

who was on the tier is "Officer Riley." A third affidavit, this one by inmate David Johnson on August 31, 1976, avers that he was with affiant Harris when plaintiff Gordon approached them "[o]n a day in January" and overheard Gordon's account of the assault and robbery near two apparently disinterested officers. Johnson avers that Gordon was "badly beaten and his face was bleeding." Johnson adds that Gordon declined to go to the hospital because "he feared for his life, and . . . if he went to the hospital . . . they would expect him to tell them what had happened to him."

The defendants have filed two supplemental answers. The first one, filed September 27, 1976, complies with the Court's request for the identity of the officer in charge of Cell Block One on January 29, 1976 when the alleged attack of Gordon took place. The affidavit of Assistant Correctional Supervisor M. Woodward, Jr., dated September 20th, avers that he was on duty at Cell Block One on January 29, and that no one including the plaintiff informed him of the assault now claimed by Gordon and Harris to have occurred within his jurisdiction. Woodward adds the obvious, *i.e.,* that had such an assault been reported to him, he would have conducted an investigation "immediately."[2] The second supplemental answer denies that averment of affiant Joe Harris that "Officer Riley" witnessed the assault of the plaintiff. Attached to the answer is the affidavit of officer Neville Riley, dated September 29, 1976, denying any knowledge of the alleged assault upon Gordon. Riley adds that he was not on duty on January 29, 1976, and attendance logs of correctional officers for that date are annexed to the supplemental answer filed on

[2] From the numerous § 1983 cases this member of the Court has been called upon to decide, judicial notice can be taken of the practice of Department of Corrections officials to investigate crimes and violations of disciplinary rules in the South Carolina prison system. Many such cases complain of the facts concerning such investigations. It is obvious, however, that an unreported crime cannot be investigated. *Cf.* Joyner v. McClellan, 396 F. Supp. 912, 915 (Md. 1975).

October 5, 1976, purporting to attest that Riley and eleven other officers were "Off" on the day shift which worked Thursday, January 29, 1976.

The plaintiff has not responded to the two supplemental answers or to the affidavits of Woodward and Riley.

Although the Court is not fully persuaded that some type of assault did not occur, the plaintiff has not stated a claim of constitutional import against defendants Leeke and Martin. Two of the affidavits submitted by the plaintiff himself[3] aver that the alleged incident was not reported to authorities because of Gordon's fear of possible reprisals against him. Although Gordon has earlier alleged that he reported the incident to a Deputy Warden (Davis) when he sought protective custody on or about February 1, 1976, the Deputy Warden flatly denies plaintiff's claim, and the plaintiff has not submitted any additional corroboration since that denial was filed.[4] It would defy a normal determination of credibility to believe that Gordon reported the rape to Warden Davis immediately after the offense when he now claims he wouldn't even go to the hospital because hospital authorities would require him to report the cause of his alleged injuries.

As stated in a previous Order, this case, at best, is nebulous. However, dismissal is necessary for another reason that is more compelling. The plaintiff seeks damages in this suit from two officials of the Department of Corrections who are not subject to liability for damages here under the doctrine of *respondeat superior.*[5] The personal involvement of defendants Leeke and

[3] These are the Gordon and Johnson affidavits.

[4] The affidavit of Herbert Davis was filed on August 9, 1976, and was mentioned in the Court's previous Order of August 24, 1976.

[5] Barrow v. Bounds, 4 Cir. (unreported), 498 F.2d 1397 (1974); Chapman v. Slayton, 4 Cir. (unreported), 526 F.2d 588 (1975); Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973); and Bursey v. Weatherford, 528 F.2d 483, 488 n.7 (4 Cir. 1975).

Martin is not shown in any of the pleadings, and they cannot be held vicariously liable for the alleged acts of their subordinates. Their direct involvement in an act or acts constituting a deprivation of a right secured to a prisoner under the Constitution, or a deliberate ratification of such a constitutional deprivation, must be alleged *and proved* before liability could attach. No such involvement or acquiescence is shown here, or even alleged. Therefore, it is nececcsary for the complaint of the plaintiff to be dismissed.[6]

AND IT IS SO ORDERED.

ROBERT W. HEMPHILL,
United States District Judge.

Columbia, South Carolina
November 30, 1976

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[6] The Court assumes that the identification by the plaintiff of one of his alleged rapists will have prompted an investigation of the rape incident alleged by him by the Department of Corrections by this time. If plaintiff is willing to testify against "Bernard Brown," if such a person was in fact at CCI for the two or three days Gordon was not locked up during January of 1976, administrative action, if not criminal action, would appear to be justified if a proper case is made. This observation is made because of the defendants' omission of any mention of Brown in their last two answers, in contrast with express reference to officer Riley's identification.